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IN THE
SUPREME COURT OF THE UNITED STATES

OWASSO INDEPENDENT SCHOOL DISTRICT NO. I-011,
A/K/A OWASSO PUBLIC SCHOOLS, ET AL.,
Petitioners,

v.

KRISTJA F. FALVO, AS PARENT AND NEXT FRIEND OF HER MINOR CHILDREN, ELIZABETH PLETAN, PHILIP PLETAN AND ERICA PLETAN,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS ON THE MERITS

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QUESTION PRESENTED

Whether the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), which requires educational institutions to preserve the confidentiality of "education records," prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other's homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class.

PARTIES TO THE APPEAL

The caption of the Brief for Petitioners lists all parties to the appeal.

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BRIEF OF RESPONDENT ON THE MERITS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Kristja J. Falvo, as parent and next friend of her minor children, Elizabeth Pletan, Philip Pletan and Erica Pletan, respectfully submits her Brief on the Merits to this Honorable Court. Respondents seek affirmance of the decision of the United States Court of Appeals for the Tenth Circuit in *Falvo v. Owasso Independent School District No. I-011*, 229 F.3d 965 (10th Cir. 2000), that Petitioners violated the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, by establishing a policy or practice of allowing teachers to require students to grade one another's tests and other work and to call out their own grades in class.

JURISDICTION

The issue on appeal arises under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA"), and jurisdiction is conferred on this Court pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 1331 and 1343(a)(3) and (4). This action also arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202.

This Court has subject matter jurisdiction over this action, because the specific violation of FERPA which Falvo alleged is actionable under § 1983. Here, Falvo not only asserted a specific violation of FERPA under § 1983, she also requested relief under 28 U.S.C. §§ 2201, 2202. Accordingly, subject matter jurisdiction is present.

The issue of whether Respondents could bring a 42 U.S.C. § 1983 action against Petitioners for violations of FERPA has not been raised in the question presented or briefed by Petitioners, and accordingly should not be considered by the Court. *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals *and included in the question on which we granted certiorari*") (emphasis supplied); *Blessing v. Freestone*, 520 U.S. 329, 340, n. 3 (1997) (declining to address issues of Eleventh Amendment application and whether *Maine v. Thiboutot* should be overruled as neither decided below nor presented in the petition, citing SUP. CT. RULE 14.1(a)); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

In the event the Court elects to address the issue of jurisdiction under § 1983, it is clear from the language and intent of FERPA that Congress enacted the statute to afford parents of public school students such as Respondents the right to consent to the disclosure of their educational records. As the Tenth Circuit observed, a consensus has developed among the federal courts that a § 1983 civil rights lawsuit may be predicated upon a violation of FERPA. 229 F.3d at 965, citing *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2nd Cir. 1986); *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 672-74 (D. Minn. 1999); *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F. Supp. 1104, 1107 (Dist. S.D. 1995); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 47-48 (Dist. N.H. 1994); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991), and contrary authority, *Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996); *Norris v. Board of Educ. of Greenwood Community Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992).

The Supreme Court has "repeatedly held that coverage of § 1983 must be broadly construed. The legislative history of the section also stresses that as a remedial statute, it should be liberally and beneficently construed." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (internal quotations and citations omitted). In *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court explained that a plaintiff seeking § 1983 redress must assert the violation of a federal right. To determine whether a federal statute confers a right enforceable under § 1983, a court must consider the following factors: (1) whether the plaintiff is an intended beneficiary of the statute; (2) whether the plaintiff's asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the State actor. 520 U.S. at 340-341. Since Falvo's specific, asserted claims under FERPA satisfied each of these three criteria, the Tenth Circuit correctly held that Falvo may maintain a § 1983 action.

The plain language of FERPA reveals that it is intended to protect the right to privacy of students and their parents. Section 1232g(a)(1)(A) provides in pertinent part that "the parents of students" have the *'right to inspect* and review the education records of their children." This subsection further provides that "each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children."

Consistent with this subsection, § 1232g(b)(1), the section implicated here, provides that an educational institution shall not release education records or personally identifiable information contained therein "without the written consent of their parents." Section 1232g(b)(2)(A) reiterates the parent's right to consent by providing that no educational institution shall have a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information without parental consent. Thus, Congress conferred on Falvo a specific "*right to consent*" to the release of education records of her children, or any information contained therein.

Section 1232g(d) also provides that the "rights" conferred on a parent are extended to a "student who has attained the age of eighteen years of age, or is attending an institution of postsecondary education." Thus, "the *rights* accorded to the parents of the student shall thereafter only be required of and accorded to the students." Moreover, § 1232g(e) specifically provides that parents or students must be informed of their "*rights* accorded them by this section."

The foregoing demonstrates the specific intent of Congress to explicitly confer rights and benefits to parents and students that previously did not exist. Indeed, prior to the enactment of FERPA, parents and students were without specific rights to access or consent to release of their educational records. Moreover, the sponsors of FERPA stated, "[t]he purpose of the Act is two-fold – to assure parents of students [the right to] access... their education records and to protect such individuals' *rights to privacy*...." 120 CONG. REC. 39862 (Dec. 13, 1974). The benefits Congress intended to confer on parents and students are thus

sufficiently specific and definite, and well within the judiciary's competence to enforce. The relevant provision of FERPA, therefore, was intended to benefit Falvo and her children.

Additionally, the Tenth Circuit correctly held that § 1232g(b)(1) reflects a binding obligation on schools that have received or are the recipients of federal funds, rather than a mere Congressional preference for a certain kind of conduct. Indeed, if a school received federal funds then it is obligated to comply with extending the rights conferred under the foregoing provisions. The language of this provision has been similarly interpreted by this Court as creating "precise requirements." *Suter v. Artist M.*, 503 U.S. 347, 361 n.12 (1992). FERPA repeatedly employs the mandatory language, "shall," rather than merely precatory language. *See, e.g.*, 20 U.S.C. § 1232g(b)(1) ("No funds shall be made available...."). In fact, the mandatory language "shall" is employed in every substantive subsection of the Act, without exception. Accordingly, the right conferred under § 1232g(b)(1) makes clear that it is neither vague nor amorphous and, thus, within the judiciary's competence to enforce. *Accord Livadas v. Bradshaw*, 512 U.S. 107, 134 (1994) (right of employees to complete collective bargaining process and agree to arbitration clause "is, if not provided in so many words in the [National Labor Relations Act], at least [] immanent in its structure...."); *Cannon v. University of Chicago*, 441 U.S. 677, at 690, n. 13 (1979) (citing "rights-creating language" in Title IX and Title VI, 42 U.S.C. § 601, in holding implied right of action existed to enforce Title IX). *Cf. Alexander v. Sandoval*, 532 U.S. 275, 530 (2001) ("rights-creating" language of § 601

critical to *Cannon* analysis contrasted with that of § 602 limiting agencies to "effectuating" rights created by § 601).[1]

Finally, Congress did not expressly or impliedly foreclose § 1983 remedies in FERPA. Congress clearly did not expressly forbid recourse to § 1983 in the statute itself. Indeed, the "provisions of the amendment do not affect whatever *rights a student or his parents* might have in *civil proceedings*." 120 CONG. REC. 39863 (Dec. 13, 1974). Also,

> [i]t is the hope of the sponsors of this amendment that it will do much to clear up many of the unanswered questions, so that the substance of the provisions may be carried out in schools and colleges across the country as soon as possible, and so that *parents and students may properly begin to exercise their rights under the law, and the protection of their privacy may be assured.*

Id. (emphasis added).

This Court has held that an administrative scheme, which provides the administering agency the power to *cut off federal funds*, was "insufficient to indicate a congressional intention to foreclose § 1983 remedies." *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 425 (1987). The Supreme Court reached the same conclusion in *Wilder v. Virginia Hosp. Ass'n*, in which it held that the Secretary of Health and Human Services had power to withhold federal funding to States whose plans did not comply with federal law. 496 U.S. 498, 521 (1990). Moreover, the Owasso School District failed to establish the difficult showing that allowing such actions to go forward in these circumstances would be inconsistent with Congress' carefully tailored scheme. *See Blessing*, 520 U.S. at 341. As the Court stated in *Virginia Hosp. Ass'n*:

> "'We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy' for the deprivation of a federally secured right." *Wright [v. Roanoke]*, 479 U.S. at 423-424 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). The burden is on the State to show "by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright, supra*, at 423.

Wilder, 496 U.S. at 520-521. Petitioner has not even attempted to meet this burden here. Accordingly, the Tenth Circuit correctly concluded that the Department of

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[1] The Supreme Court observed in *Cannon*:

> Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, *this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff* in the case.

441 U.S. at 690, n. 13 (emphasis supplied). *Cannon* was decided the year before *Maine v. Thiboutot*, 448 U.S. 1 (1980) held that a statutory right could be enforced via § 1983. Respondents submit that FERPA satisfies not only the § 1983 standard of *Thiboutot*, but the higher standard for an implied right of action applied to a similar educational spending statute in *Cannon*.

Education's oversight powers were insufficiently comprehensive to close the door on § 1983 liability.

Further, even apart from Falvo's actionable § 1983 claim, this Court has recognized that plaintiffs may vindicate their claims by seeking declaratory and equitable relief in federal district courts under 28 U.S.C. §§ 2201 and 2202. *See Golden State v. City of Los Angeles,* 493 U.S. 103 (1989). Indeed, this Court explained that "[t]hese statutes do not limit jurisdiction to those who can show the deprivation of a right, privilege, or immunity secured by federal law within the meaning of § 1983." As such, Falvo's claims are actionable under 28 U.S.C. §§ 2201 and 2202.

STATUTORY PROVISION INVOLVED

This case involves application of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. The full text of FERPA is set forth in the Petitioners' appendix to their Brief on the Merits.

STATEMENT OF THE CASE

The Owasso School District has a district-wide custom of permitting its teachers to circumvent FERPA's prohibition against the nonconsensual release of student grades. Students may be required by teachers to "call out" their exam grades for the *sole purpose* of allowing teachers to record their grades in a grade book or other student file. (J.A. 14-15) The grade being "called out" is information that is maintained by the Owasso School District, by and through its agent, the teacher. Owasso has no policy that prohibits teachers from compelling students to disclose their grades. (J.A. 15) The practice occurs in all courses and is prevalent

throughout the school district from elementary through high school. (J.A. 16-17) There is no evidence in the record suggesting that "calling out" grades has any pedagogical value.

In some classes the students are compelled to exchange exams. (Record in the Tenth Circuit, Appellant App., pp.19-20) When the teacher announces the correct answers, the students put a grade on their fellow students' exam. (*Id.*, pp.19-20) Once the grading is accomplished, the teacher has the student "call out" his or her grade so that the teacher can record the grade in the grade book. (*Id.*) Even though some teachers permit a student to bring his or her grade to the teacher, not all teachers employ this practice. (*Id.*) Moreover, there is no policy that prohibits a teacher from compelling a student to orally "call out" his or her grade, even if the teacher allowed each student to grade his or her own test. (*Id.*)

Even though the Owasso School District has a district-wide custom of permitting this practice, not all teachers employ students to grade one another's work (J.A. 12; Record in the Tenth Circuit, Appellant App., pp. 15, 19, 93, 178-180). Consequently, there exist other alternatives to the practice of having students correct other students' papers and then compelling them to "call out" their grades as the teacher records the grade. (J.A. 12-13; Record in the Tenth Circuit, Appellant App., pp. 15, 93, 178-180)

The principal of an Owasso elementary school has her teachers either grade the exams, quizzes and homework themselves or, alternatively, requires that the individual student grade his or her own exams, quizzes or homework. (Record in the Tenth Circuit, Appellant App., p. 178) There

is no evidence that this particular elementary school assigns any less work or that the absence of this practice at this school has had any detrimental effect upon the children's education or their teachers' ability to educate. (*Id.*)

There are still other means by which teachers work efficiently and effectively without disclosing the confidential grades of their students. (Petition for Certiorari, App. A-28; 229 F.3d at 973) Some teachers simply direct the students to turn their tests over so the grade is not revealed. (Pet. App. A-29; 229 F.3d at 973) Other teachers also may have students come to retrieve the graded papers one at a time, so they do not see each others' grades, or fold over the papers to conceal the students' grades but not their names and, thus, allow a student to hand back the papers. (*Id.*)

Kristja J. Falvo is the mother of Elizabeth, Philip, and Erica Pletan, who all attend school at Owasso School District. (Record in the Tenth Circuit, Appellant App., pp.34-36) Falvo learned that a number of her children's teachers would have their students grade one another's exams and then would have the students "call out" their own grades to the teacher. (J.A. at 10)

Falvo's son Philip was, at that time, a special education student who was being "mainstreamed" by the Owasso School District. (Record in the Tenth Circuit, Appellant App., p. 39) During the 1997-98 and 1998-99 school years, Falvo complained about this grading practice to the Owasso administrators. (*Id.*, pp. 38, 39, 45, 47, 49) She claimed that this policy created an environment for ridicule and humiliation – especially at the middle school grade levels where the other children were ridiculing her son for the

grades he was receiving. (*Id.*, pp. 39-41). Owasso, however, failed to provide Falvo any opportunity to consent to the release of her children's grades. (*Id.*)

In October 1998, when Falvo's children were in the sixth, seventh, and eighth grades she brought a class action lawsuit pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983 alleging that the Owasso School District violated her right to consent to the release of the children's education records, namely the grades received on exams and other student work. (*Id.*, pp. 32-50).

Falvo subsequently moved the district court for a restraining order. The matter was heard on October 14, 1998, and the Court entered an order denying the requested relief. (*Id.*, pp. 18-26) Falvo then moved the court for certification of the class. Without a ruling on the class certification issue, on February 3, 1999 Falvo moved the district court for declaratory and summary judgment. (*Id.*, pp. 64-66) Owasso filed a cross-motion for summary judgment. (*Id.*, pp. 120-122) The district court concluded that the grading practice did not implicate any constitutionally protected privacy interest. (*Id.*, pp. 10-17) Additionally, the court ruled that the "grades" that students receive on exams were not "education records" under FERPA. (*Id.*, p. 14) The district court granted summary judgment in favor of defendants.

Falvo timely appealed the district court's judgment to the Tenth Circuit, asserting that the grading practice violated both the Fourteenth Amendment and FERPA. The Tenth Circuit affirmed the district on the Fourteenth Amendment claim but reversed on the FERPA claim. (Pet. App. A-32; 229 F.3d at 974)

A unanimous panel held that the grades being recorded on the students' exams are education records and, thus, the custom of releasing the grades without Falvo's consent violated her rights under FERPA. (Pet. App. A-28; 229 F.3d at 973) Based purely on the language of the statute itself, the Court of Appeals found that § 1232g(b)(1) prohibits an educational institution from maintaining a "policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students without the written consent of their parents" to anyone other than the designated authorities, which does not include other students. (Pet. App. A-17; 229 F.3d at 968).

The court explained that there is no dispute that the grades which students place on each other's papers and then report to the teacher "contain information directly related to a student." (Pet. App. A-21; 229 F.3d at 970) It further held that the language of the statute indicated that Congress intended the term "education records" to include grade books and that the grades being recorded by the teacher were necessarily being "maintained" by a person acting for the educational institution. (Pet. App. A-22; 229 F.3d at 970).

The Court of Appeals reversed the district court and remanded the case for further proceedings. After Petitioners' request for rehearing *en banc* was denied, they filed a petition for writ of certiorari. This Court granted certiorari. 121 S.Ct. 2547 (2001).

SUMMARY OF THE ARGUMENT

Because the grade book is clearly within the statutory text of "education records" and because § 1232g(b)(1) textually prohibits the release of "*information* contained therein," to interpret the statute to allow school districts to force their students to "exchange" or "call out" grades as the

teacher is recording the grade in the grade book clearly violates the parents' right to consent to the release of the grades. It is counterintuitive to construe a mandate so direct and clear as to find that the definition does not include "grades" recorded on exams, quizzes and other student work being recorded by the teacher.

Even the Department of Education, Family Policy Compliance Office ("FPCO") acknowledges that under FERPA, if a teacher discloses the grades being recorded in the gradebook without parental consent the disclosure violates FERPA. *Amicus Brief for the United States* at 15, fn.9[2] Indeed, the FPCO has consistently held that grades on exams and student work are "education records." *See*

[2] "Under FERPA, if a teacher discloses his or her grade book to someone other than a substitute, the grade book would then become an education record." *Ibid.* Likewise, the United States admits, "disclosure of a class roster listing grades from a teacher's grade book would violate FERPA because the disclosure would remove the grade book from the 'sole possession' exception of Section 1232g(a)(4)(B)(i) and such disclosure of education records is not authorized under FERPA." *Id. See* Lodging of Respondents, Letter to Ms. Barbara Goodwin (July 13, 1998), at 055 (teacher's grade book not a "sole possession record" because released to union officials); Letter to Dr. Curtis Culwell, Lubbock Independent School District (June 25, 1998), at 067 (announcement of names and grades of students passing test was unauthorized disclosure of education records); Letter to Mr. Larry Hollstein, San Juan Basin Area Vocational-Technical School (May 13, 1998), at 080 (grid sheet posted with levels of student achievement an education record); Letter to Dr. Richard Carpenter, Calhoun Community College (April 28, 1998), at 086 (grades in grade book improperly disclosed by failing to hide or redact when showing grades to individual students); Letter to Ms. Mary Beth Myers, Indiana University – Bloomington (July 24, 1995), at 097 (FERPA forbids posting student grades by name *or* social security number without consent).

Opinion Letters of Department of Education Family Policy Compliance Office cited at n. 2, *supra*.

Accordingly, because Congress intended that the grades being recorded in the teachers grade book were intended to be kept private and not released to anyone without parental consent, the Tenth Circuit's decision should be affirmed.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT IS IN HARMONY WITH THE PLAIN LANGUAGE AND PURPOSE OF THE FEDERAL STATUTE.

The Tenth Circuit's decision comports with the purposes and objectives Congress intended to achieve under the plain language of FERPA. The Tenth Circuit correctly held that:

> [Since] Congress intended FERPA to preclude a teacher from revealing to one student the grades of another student when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book.

Pet. App. A-25; 229 F.3d at 971. The Court limited its analysis to the "grades" on the student papers, and did not hold that the papers themselves were also FERPA records.

FERPA has two primary purposes: (1) granting parental *access of information* contained within a student's "education records," § 1232g(a)(1)(A), while at the same time (2) protecting parental *right to consent to disclosure* of that information to third parties. § 1232g(b)(1). The

legislative history reveals that Congress was quite concerned to assure parents and students that school district practices would "*not invade the privacy of students* or *pose any threat of psychological damage to them.*" *See* U.S. CODE CONG. & ADMIN. NEWS, at 4251 (1974) (Sen.Rep. No. 93-1026, 93rd Congs., 2nd Sess.187). It is designed to protect the rights of privacy of students and their parents and to give them access to "education records." (December 13, 1974 CONG. REC. 39859). "The proposed amendments define 'education records' in order to make clear what document and other material parents and students will have access to." *Id.* at 39858. "[P]arents and students should have access to *everything* in institutional records maintained for each student in the normal course of business and *used by the institution* in making decisions that affect the life of the student." *Id.* at 39858-39859 (emphasis added). While it is not necessary to look beyond the plain language of the statute, the legislative statements clearly lend support to the conclusion that the congressional intent was to fashion a broad definition of "education records" that would include "everything" that is "used by the institution."[8]

A. FERPA Requires Parental Consent

The Tenth Circuit correctly held that calling out or exchanging a student's test grade at the direction of a teacher

[8] The FPCO has recently held that "[t]his term is broadly defined to include all records which are directly related to a student and maintained by an educational agency or institution, or a party acting for such agency or institution. Thus, the location or manner in which an education record is maintained, such as whether or not it is placed in the student's cumulative file, does not affect its status as an education record... any record, such as a permanent records card, a student's homework assignment or exam, a teacher's grade book" are education records. Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Dr. Judith Fox, Byram Hills Central School District (June 12, 2001), Respondents' Lodging at 006.

for the purpose of recording the grade in the teacher grade book nullifies any safeguard afforded to a parent or student against prohibited disclosure. Pet. App. at A-23; 229 F.3d at 970. Not only has the grade been revealed to other students, it is inevitably revealed to the other students' parents. Thus, Owasso has violated FERPA by permitting its teachers to reveal Falvo's children's exam grades to other students without first obtaining her § 1232g(b)(1) consent.

The Supreme Court has long held that the interpretation of a statute designed to confer new benefits or rights upon a class of individuals, like FERPA, will "be entitled to a liberal construction to accomplish its beneficent purposes." *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949). The express language of a statute is controlling, absent a clearly expressed legislative intention to the contrary. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This Court has said that it "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The plain language of FERPA prohibits educational institutions that receive federal funding from maintaining "a policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students *without the written consent of their parents*" to anyone other than statutorily-designated authorities, which does not include other students. 20 U.S.C. § 1232g(b)(1)(emphasis added).

The text of § 1232g(b)(1), prohibits the practice of calling out or exchanging grades without "parental consent." Indeed, the precise language of the text provides that a school district may not release education records or personally identifiable information of a minor student contained therein "*without the written consent of their*

parents." 20 U.S.C. 1232g(b)(1). There is no ambiguity in this provision. It is clear on its face. FERPA was created for the benefit and welfare of every parent and student. The Court of Appeals correctly explained that if the school district permits its teachers to engage in releasing the grade information, it simply must do so "anonymously or with the consent of parents." Pet. App. A-28, n. 13; 229 F.3d at 973, n. 13.

B. Grades Received By A Student On Exams, Quizzes And Other Work Are "Education Records"

FERPA further defines "education records" as "those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution." *Id.* § 1232g(a)(4)(A). Based purely on the textual language of the statute itself, the grades which students receive on their academic work, whether exams, quizzes or other materials and then report to the teacher for the purpose of recording in a grade book or some other record constitute "education records" under FERPA.[4] These grades which students receive on exams and then report to the teacher "contain information directly related to a student" and are being "maintained... by a person acting for [an educational]... institution." *Id.* § 1232g(a)(4)(A)(i) and (ii).

It is undisputed that students are directed by the teacher to either score one another's work or call out their own

4 The FPCO has held that "[c]learly the... grades received for [written reports and projects] are education records as that term is broadly defined. Letter from Dr. LeRoy S. Rooker, Director, Family Policy Compliance Office to Mr. Julio Almanza, Duluth Public Schools (January 28, 2000), Lodging of the Solicitor General, at p. 4.

grades specifically to enable the teacher to record the grade in the grade book. The grade books and the grades within are, therefore, necessarily "maintained" by the teacher. Thus, the teacher is "maintaining" these grades in a grade book or some other file. Because the grade book is clearly within the statutory text of "education records" and because § 1232g(b)(1) textually prohibits the release of "*information* contained therein," forcing students to "exchange" or "call out" exam grades as the teacher is recording the grade in the grade book clearly violates Falvo's right to consent under § 1232g(b)(1).

To suggest that the definition does not include "grades" recorded on exams, quizzes and other student work being recorded by the teacher is simply counterintuitive. It is difficult to imagine broader language.[5] "Assertions of ambiguity do not transform a clear statute into an ambiguous provision." *United States v. James*, 478 U.S. 597, 604-605 (1986). Indeed, in *Belanger v. Nashua, New Hampshire, Sch. Dist.*, 856 F.Supp. 40, 49 (Dist. N.H. 1994), the court explained:

> The change from the laundry list of items to the definition of "education records" as it appears today, along with the legislative history of the Amendment, lends support to the conclusion that

[5] The FPCO has held that "[t]his term is broadly defined to include virtually all records which are directly related to a student and maintained by an educational agency or institution, or a party acting for such agency or institution. Thus, the location or manner in which an education record is maintained, such as whether or not it is placed in the student's cumulative file, does not affect its status as an education record." Letter to Dr. Viji George, Concordia College (May 1, 2001), Lodging at 014.

> the *congressional intent was to fashion a "broad definition."*[6]

This "broad definition," coupled with an intuitive prudence necessarily finds that academic grades that are being used, collected and recorded by the school district or the teacher acting on its behalf fall clearly within the term "education records."

This is precisely why the FPCO held that the grades in the teacher's grade book are "educational records." Letter Opinion of Leroy S. Rooker, June 25, 1998, Lodging at 067. Consistent with the Tenth Circuit analysis the FPCO held that the grades contained in the "grade book" are subject to rights, privileges and obligations contained within the text of FERPA. *Id.*

Even though FERPA prohibits the release of personally identifiable information, it does explicitly identify certain information that *may* be released by the school district without first obtaining prior parental or student consent. This is identified in FERPA as "directory information." 20 U.S.C. § 1232g(a)(5)(A).

[6] For this reason, the FPCO has historically adhered to an expansive reading of the scope of education records protected by FERPA:

> [T]here is no support for a narrow and overly technical reading of the word "maintaining" to allow schools to create and use whole categories of records that are directly related to students but not made available for inspection and review because the school formally does not keep the records for "file purposes" or keeps them only for short periods of time and in a teacher's desk, folder, or briefcase.

Letter to William H. Burkhalter, Jr., Esq. (April 28, 1998), Lodging at 084.

"Education records" which may be released without prior parental consent include the following:

> the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A). Notably, the statutory list does *not* include students' test scores or grades. Thus, any personally identifiable information not listed as "directory information" shall not be disclosed, disseminated or revealed to anyone other than the student's parent or school officials.

Had Congress intended that test score grades being recorded and assessed by the teacher would be made public without parental consent it could have easily listed "exam grades" or "test scores" as "directory information." Congress, however, did not list "grades," "test scores" or "teacher ratings" of any kind in the list of directory information. Indeed, this Court has admonished that it is impermissible to create exceptions in addition to those specified by Congress. *United States v. Smith*, 499 U.S. 160, 166-167 (1991). *See, Consumer Prod. Safety Comm'n*, 447 U.S. at 108 ("If Congress had intended to exclude FOIA disclosures... it could easily have done so explicitly in this section as it did with respect to the other listed exceptions.")

Accordingly, Petitioners' suggestion that they ought to be permitted to release the grade information that is being recorded in the teacher grade book without first obtaining parental consent belies the textual exceptions identified in "directory information."

C. The Teacher Grade Book Is Not A "Sole Possession Record"

The term "education records" does not include records of instructional personnel "which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute...." *Id.* § 1232g(a)(4)(B)(i). Contrary to Petitioners' suggestion however, the teacher's grade book is not a "sole possession" record exempt from the privacy protection of FERPA. It is important to note that the Tenth Circuit correctly explained that "this language explicitly provides that records of instructional personnel, such as grade books, do not constitute 'education records' *only if* they 'are not accessible or revealed to any other person except a substitute.'" *Id.* Because the grades contained in the grade books in this case are necessarily revealed to parents and students (*e.g.* parent/teacher conferences), the grade books are not "sole possession" records, but rather "education records" as defined in § 1232g(a)(4)(A).

As the Court of Appeals correctly explained, "[i]f grade books never constitute 'education records,' teachers would be free under FERPA to reveal them to anyone, thus obviating the need to provide in the statute" the language, "and which are not accessible or revealed to any other person except a substitute." 229 F.3d at 970.

Even assuming, *arguendo*, that a grade book is construed as a "sole possession" record, such construction does not categorically exclude the grades contained therein. It is without doubt that § 1232g(a)(4)(B)(i) prohibits the teacher from disclosing personally identifiable information in a teacher's "sole possession" record. The text provides that the information shall "not [be] accessible or revealed to anyone other than a substitute." *Id.* Moreover, the FPCO holds that

FERPA protects the information contained in "sole possession" records because the text of the provision prohibits the release of the information.[7]

This construction is consistent with the FPCO's letter opinion dated June 25, 1998, wherein the FPCO held that "a teacher's grade book does not meet the "sole possession" record exception under FERPA."[8]

It is, therefore, the Petitioners' construction, not the Tenth Circuit, that renders superfluous the "sole possession"

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[7] "[A]s with education records, personally identifiable information contained in sole possession records may not be disclosed to third parties without prior written consent." Letter from Dr. LeRoy S. Rooker, Director, Family Policy Compliance Office to Mr. Julio Almanza, Duluth Public Schools (January 28, 2000), Lodging of the Solicitor General, at p. 6.

[8] Consistent with the Tenth Circuit's analysis, the FPCO held that the grades contained in the "grade book" are subject to rights, privileges and obligations contained within the text of FERPA. Indeed, the FPCO found that the "sole possession" exception is strictly construed to mean "memory jogger" type of information. "For example, the exception includes information that a school official uses as personal reference tool and, thus, is generally maintained by the school official unbeknownst to other individuals." Thus, the FPCO has drawn a distinction between "sole possession" notes and an "education record." The FPCO held that the grades in the teacher's grade book are "educational records." Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Mr. Andrew Marko, Wyoming Valley West School District (June 25, 1998), Lodging of the Solicitor General, at p. 2.

records exception. Thus, it would be implausible to consider the grade book within the meaning of "sole possession" records, and at the same time permit "access" to the information of every child's grade information on the grounds that the "sole possession" records are not "education records." Such textual construction would not be consistent with the purpose of keeping private the "grades" being recorded by the teacher in the grade book. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Accordingly, the teacher grade books, and the grades therein, are FERPA records.

Owasso's argument is further undermined by its own written FERPA policy. Record in the Tenth Circuit, Appellee App., pp. 157-158. The Owasso FERPA policy provides, in part, that "sole possession" records are not "education records" only if they meet the following three criteria.

> (1) It was made as a personal memory aid;
> (2) It is in the personal possession of the individual who made it; and
> (3) *Information contained in it has never been revealed or made available to any other person except the maker's temporary substitute.*

As does § 1232g(a)(4)(B)(i), subsection (3) of the Owasso policy clearly mandates that a teacher cannot reveal the "information" to anyone other than a substitute. In fact, the school district policy specifically states that in order to qualify as a sole possession record "it must *never* have been

revealed or made available" to any other person except the substitute. Thus, Petitioners' own legal interpretation of FERPA specifically provides that the "information" must *never have been revealed* to anyone.

D. Petitioners' Additional Contentions Provide No Assistance to Their Position

Petitioners alternatively suggest that the "right to a hearing" provision in § 1232g(a)(2) would seemingly allow a student to challenge the grade he or she received from the teacher on every exam, quiz or homework assignment if the grade being recorded in the grade book is an education record. However, the legislative comment, upon which Petitioners' rely, actually confines § 1232g(a)(2) to only allow a hearing for an *incorrectly transcribed* grade, *not* to challenge the grade actually given in the student's performance. 120 CONG. REC. 39,862 (1974). Thus, if a teacher had incorrectly recorded a test grade in the grade book, a parent or student would simply be entitled to a hearing to determine if the grade given was the actual grade recorded.

The Tenth Circuit did not suggest that the hearing process can be used to challenge the fairness of the grade or the teacher's grading standards on student tests or homework, but only that the accuracy of the grade being recorded in the grade book itself.

Indeed, such inaccuracies in grading are presumably resolved informally thousands of times a year for thousands of students across the country. Petitioners' fears and speculation that every student would somehow have a right to hearing to change a grade on every test are simply unfounded and exaggerated. Indeed, courts should exercise

great wariness in the construction of statutes where their meaning is sought to be derived, not from specific language, but out of the innuendoes and hypothetical consequences in other portions of the statute. *Palmer v. Massachusetts*, 308 U.S. 79, 83-84 (1939).

If there was any doubt or ambiguity as to Congress' intent of § 1232g(a)(2), then the legislative comment in the Joint Statement removes it. Since all contingencies cannot be envisioned, courts have generally found it wiser to delay passing upon the validity of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. *Watson v. Buck*, 313 U.S. 387, 402 (1941).

Petitioners also suggest that the defined term "education records" if it included student grades would prohibit a central custodian from maintaining an access record under § 1232g(b)(4)(A). Petitioners Brief at 25. Such speculation is likewise unavailing. Nothing in the Tenth Circuit's interpretation of the term "education records" would prohibit a central custodian from maintaining the access logs. The Court of Appeals correctly explained that the access log requests can still be maintained by each school district centrally. In any event, access logs are required only for nonconsensual disclosures to certain persons outside the school system, and can be viewed only by parents, record custodians, and other education authorities for audit and evaluation purposes. 20 U.S.C. § 1232g(b)(4)(A).

Subsection 1232g(b)(4)(A) specifically states that the custodian could be a "school official and his assistants." Obviously, the custodian contemplated by Congress could be any "school official" or anyone deemed an assistant to a "school official." That this provision somehow prohibits a

finding that student grades are "education records" offers nothing of real assistance to the issue presented.

Assuming, *arguendo,* that only those grades held by the "central custodian" are "education records," a teacher would be free to disclose or disseminate final course grades prior to turning the course grades into the "central custodian" since the final course grade was not yet maintained by the "central custodian." Such a result is an absurdity. "It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

II. The Tenth Circuit Correctly Rejected the FPCO's Informal Letter Opinion Under *Chevron, Skidmore* and *Christensen*

The Tenth Circuit properly rejected the district court's deference to a 1993 FPCO informal letter opinion under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and *Christensen v. Harris County*, 529 U.S. 576, 585 (2000). The Court of Appeals rejected the Rooker letter for two reasons. First, the Court of Appeals found the meaning of the term "education records" was clear from the statute itself. Pet. App. A-18; 229 F.3d at 969. The language of FERPA plainly and unambiguously articulated Congressional intent to provide parents the right to consent to release of their children's grades. Pet. App. A-19; 229 F.3d at 970. A court may only defer to an agency's interpretation if a statute is deemed ambiguous under *Chevron,* 467 U.S. at 842-44 (deference granted only when there is an ambiguity and, only then, when the agency's interpretation is reasonable). Second, the Tenth Circuit explained that,

> even if the relevant statutory language was ambiguous, the Supreme Court recently announced that *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by the administering agency under *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000)

Pet. App. A-19; 229 F.3d at 969. Additionally, the Court of Appeals held that the Rooker letter would carry minimal persuasive power under *Skidmore* since the letter contained a disclaimer that the FPCO had *not thoroughly* considered the issue before the court. The letter contained the following:

> Because you do not fully explain the details surrounding the activities you identify, *it would not be appropriate for this Office to comment on* whether the District's participation in the activities would violate rights afforded parents by FERPA.

Pet. App. A-20; 229 F.3d at 970; Record in the Tenth Circuit, Appellant App., p. 157-159.

Generally, Rooker explains that an educational agency is "prohibited by FERPA from publishing or posting the grades of students if personally identifiable." Yet, illogically, he concludes that FERPA would not prohibit the practice of a student "calling out" his or her grade as the teacher is recording the grade in the grade book.

Nowhere in the letter does Rooker once mention or refer to any agency ruling, investigation, public commentary, or case authority that would support this conjecture. Indeed, Rooker himself deems the letter a "general discussion." Rooker had not received into evidence any testimony of the actual harm and ridicule the practice of disclosing grades might implicate. Hence, the issue was not presented to the

agency, and the agency did not have jurisdiction to rule on the issue. The issue was left unresolved by the administering agency. He specifically stated that he could not rule one way or the other on the question presented since it was *not appropriate.* The letter appears to be nothing more than a memorialization of a telephone conversation between a union inquirer and Rooker.

The1993 letter is internally inconsistent with the notion of keeping confidential grades that are being recorded in the grade book. On the one hand, Rooker explains that an educational agency is prohibited by FERPA from publishing or posting the exam grades of students *if it is done in a personally identifiable manner.* Yet, on the other hand, Rooker states that "FERPA" would not prohibit teachers from having their students call out that grade in class.

Not only is this interpretation internally inconsistent, the conclusion is an unreasonable construction of § 1232g (b)(1). The calling out of grades in the classroom circumvents the teacher's §1232g(b)(1) obligation to protect the "grade" information being recorded in the grade book. In fact, the FPCO's December 20, 1996 letter opinion specifically held that "grades" on interim tests, quizzes and other student generated work were not to be disclosed to other students without parental or student written consent. Such later opinion undermines Petitioners' present reliance or Rooker's earlier 1993 opinion.

Even assuming, *arguendo*, that there existed some ambiguity with respect to § 1232g(b)(1), the Tenth Circuit correctly held that the agency's interpretation was unreasonable and inconsistent with the primary intent and purpose of FERPA. The Court of Appeals found the Rooker letter was "bereft of any reasoning underlying the rather conclusory opinion that grades written down by other

students and announced to the teacher are not maintained" by the school district. The Rooker letter ignored the broad language of the term "education records," the narrow term defining "directory information," and the stated purpose of FERPA to prohibit the release of confidential grade information.

Accordingly, the Tenth Circuit correctly rejected the FPCO's informal letter opinion under *Chevron, Skidmore,* and *Christensen.*

III. RECENT FPCO OPINIONS FIND THAT GRADES ON EXAMS, QUIZZES AND OTHER STUDENT WORK ARE "EDUCATION RECORDS" SUBJECT TO THE PRIVILEGES AND RIGHTS AFFORDED PARENTS AND STUDENTS UNDER § 1232g(B)(1)

The FPCO letter opinions find that (i) the teacher "grade book" is not a "sole possession" record, and, (ii) grades on exams, quizzes and other student work were protected as "education records."[9] Thus, the FPCO's most recent letter

[9] This 1993 letter opinion was the only FPCO letter opinion submitted by Petitioners to the district court. At no time during the district court proceedings, nor during the appellate court proceedings, did Dr. Rooker or the Petitioners disclose any other FPCO letter opinions. The *amicus* brief of the United States revealed that Rooker had in fact written at least three other letter opinions that shed light on the subject matter of the issue presented to both the district court and the Tenth Circuit. Brief of the United States at 28. Most egregiously, the United States now retreats from the FPCO's position in all of the letter opinions and even retreats from its *amicus* brief filed in this Court at the Petition stage.

Recently disclosed FPCO opinion letters dating back to 1988 reveal that it has been the consistent and unwavering policy of the DOE to interpret the phrase "education records" in the broadest possible sense, to include many types of information not maintained

in a central register. *See* Lodging: Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Macomb Community College (August 8, 2001), at 002 (student letter complaining of professor an education record even if personal information redacted); Letter to Dr. Judith Fox, Byram Hills Central School District (June 12, 2001), at 004 (student's Early Intervention Program file kept by teacher an education record; "the location or manner in which an education record is maintained, such as whether or not it is placed in the student's cumulative file, does not affect its status as an education record"); Letter to Dr. Gary M. Chesley, Bethel Board of Education (May 1, 2001), at 008 (records kept by faculty regarding student evaluations for National Honor Society admission were education records); Letter to Dr. Viji George, Concordia College (May 1, 2001), at 011 (professor's notes of student teaching evaluation disclosed verbally at meeting were education records not subject to "memory jogger" sole possession record exception); Letter to Mr. David Killips, Reed City Area Public Schools (April 2, 2001), at 015 (confidential memo regarding student taken from teacher's desk and copied by another student was education record); Letter to Mr. Robert Grueser, Warren School District (March 9, 2001), at 017 (student's threatening note and information about student disclosed to parents of other students were education records); Letter to Attorney at Law, Pittsburgh, PA (February 1, 2001), at 023 (voice mail message from parent regarding child's placement an education record); Letter to Mr. Bernard Lomman, South Eastern School District (November 17, 2000), at 026 (National Honor Society comments); Letter to Hon. James L. Oberstar, House of Representatives (March 31, 2000), at 029 (test papers considered education records once collected); Letter to Hon. Phil Gramm, United States Senate (April 5, 1999), at 031 (notes from parent-teacher conference education record); Letter to Unnamed Inquirer (December 17, 1998), at 033 (test papers considered education records once collected); Letter to Dr. Eulene Locke, Putnam County School District (December 9, 1998), at 035 (teacher maintained forms containing record of student behavior education record); Letter to Dr. Joe B. Wyatt, Vanderbilt University (October 5, 1998), at 038 (grade on a group oral presentation held an education record); Letter to Dr. Joseph Bonita, Bellefonte School District (October 5, 1998), at 041 (coach's log re participation on softball team an education

opinions undermine the Petitioners' suggestion that the exam grades are not FERPA records. More importantly, these additional FPCO letters support the Tenth Circuit's decision by finding that an educational institution cannot, under any circumstance, release grades that are being recorded by the teacher to any person other than the student or parent unless the parent has provided written consent.

For example, a student attending the State University of New York, College at Oneonta alleged that the school had violated FERPA when it disclosed his test grades without his prior written consent. Letter from LeRoy S. Rooker, Director, Family Policy Compliance Office to Dr. Alan

record); Letter to Dr. James L. Auter, Metropolitan School District of Martinsville (October 2, 1998), at 045 (teacher notes to principal regarding student, student exams and homework assignments that have not been returned are education records); Letter to Mr. Joseph Coleman, LaFayette Central School District (August 7, 1998), at 048 (National Honor Society evaluations); Letter to Tamara Walker Sieckmann, Esq., for Mesa Unified School District #4 (August 4, 1998), at 052 (same); Letter to Mr. Tony Sorci, Fort Bragg Unified School District (June 29, 1998), at 063 (teacher survey of student feelings about individual student was unauthorized disclosure of education record of that student); Letter to Dr. Cornelius Van Cain, Camp Hill School District (June 11, 1998), at 070 (National Honor Society ballots); Letter to Dr. James L. Auter, Metropolitan School District of Martinsville (May 13, 1998), at 74 (original documentation of disciplinary incidents was education record); Letter to William H. Burkhalter, Jr., Esq. (April 28, 1998), at 082 (teacher evaluation for cheerleader position education record); Letter to Dr. Joseph Brooks, Superintendent, Aiken County School District (April 27, 1998), at 089 (teacher evaluation for cheerleader position); Letter from Steven N. Schatken, Director, Office of Management, United States Department of Education, to Mr. Phil Baum, Executive Director, American Jewish Congress (April 13, 1998), at 095 (letter from parent to school officials concerning programs or activities for child an education record).

Donovan, State University of New York, College at Oneonta (December 20, 1996), Lodging of the Solicitor, p. 1. More specifically, the student alleged that during the entire semester, the professor would leave his graded papers, tests and projects uncovered in a public area. *Id.* The student alleged that this was this particular teacher's chosen method of returning graded work *Id.* The tests were left in an area that would allow anyone to review his test grades. *Id.*

The FPCO explained that under FERPA a school may generally disclose student information only after the student has provided written consent. *Id.* The FPCO held that, "[the student's] "grades" he received on class work, are education records as that term is broadly defined under FERPA." *Id.* The FPCO further admonished that FERPA vests the right to consent with the student. *Id.* Even the student's inaction by acquiescence was not sufficient to meet FERPA consent. *Id.*

The foregoing FPCO letters do support the Tenth Circuit's decision by finding that an educational institution cannot, under any circumstance, release grades that are being recorded by the teacher to any person without written consent.

IV. THE LEGAL OBLIGATION TO KEEP GRADES PRIVATE NECESSARILY PROHIBITS RELEASING THE GRADES WHILE COLLECTING THEM

In *Whalen v. Roe*, this Court held that the state had an inherent duty to avoid careless disclosure of confidential medical information during the collection phase. 429 U.S. 589, 602-606 (1977). There the state statute authorized the health officials to collect and gather names of prescription drug users. *Id.* A patient contended that the disclosure of the information to health officials violated his right to privacy.

Id. The patient, however, proffered no evidence of actual disclosure to any person other than state officials. *Id.* This Court held that the disclosure to health officials could not be said to be impermissible disclosure since the information was not disseminated to anyone *other than officials*. *Id.* Thus, the officials were obligated to keep private the information during the "gathering" and "collection" phases. *Id. Cf. Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000) (recognizing fundamental right of confidentiality of personal medical records); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) ("A right to conceal one's medical history is readily derivable from the branch of the tort of invasion of privacy that protects people against the indiscriminate publicizing of intimate details of their personal lives"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980).

In view of *Whalen* and its progeny, it would be clearly impermissible for a doctor to gather his patients together in a room for the sole purpose of having them "call out" each patient's personal medical information while his nurse records the information into a medical record.[10] Such result

[10] "The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law." Current Opinions of the Council on Ethical and Judicial Affairs, E-5.05 (Issued December 1983; updated June 1994). The AMA Board of Trustees has affirmed that "Disclosures of information about a patient to a third party may only be made upon consent by the patient or the patient's lawfully authorized nominee, *except in those cases in which the third party has a legal or predetermined right to gain access* to such information." Current Opinions of the Council on Ethical and Judicial Affairs, H-140.989(7), "Informed Consent and Decision-Making in Health Care," Board of Trustees Report NN, A-87

would be absurd. Indeed, the only permissible way this could be accomplished would be to have each patient give written consent to participate in such a practice.

Likewise, it would be clearly impermissible to allow a United States Census Bureau worker to have all residents of a neighborhood meet at a set time and place for the purpose of collecting personal information for the sake of convenience and efficiency, and require that everyone assembled "call out" their social security numbers, past years salary information, and other personal information. Such an act would clearly violate any rights of confidentiality a citizen would have in the information that is being collected by the census worker. *See* 13 U.S.C. § 9 (2001) (census information to be kept confidential and restricted to use for statistical purposes); 13 U.S.C. § 214 (2001) (penalties for wrongful disclosure of confidential census information by census worker); *United States v. Little*, 321 F.Supp. 388 (D. Del. 1971).[11]

(reaffirmed, Sunset Report, I-97)(emphasis added).

[11] Several federal and state statutes specifically create rights of privacy. Seventeen states have enacted privacy statutes, although not all of these statutes extend protection to personal information (most regulate use of a person's name or likeness). *See* J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 6.8 (2d ed.). While no Supreme Court case examines the issue of whether federal privacy statutes extend to forbidding the collector of the information from disclosing the information, several federal statutes have language which specifically precludes agents of federal agencies from disclosing confidential information. *See id.* at § 5.81. The Privacy Act of 1974 prohibits federal agencies from disclosing private records and requires the agencies to "establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for

Yet, these examples are precisely what the Petitioners suggest FERPA provides. Such a suggestion does not advance the overriding purpose and intent of FERPA's prohibition against release of personally identifiable grade information without written parental consent. The Tenth Circuit's decision necessarily imposes the legal obligation that a teacher must keep private and confidential each student's grade during the collection stage.

V. THE TENTH CIRCUIT'S DECISION HAS NO NEGATIVE CONSEQUENCES

The Tenth Circuit clearly explained that its decision need not have negative policy consequences. The Court went out of its way to assure the school districts that "if" they wanted to continue "calling out" grades that they could continue this practice "if done anonymously or with the consent of parents." Pet. App. A-28, n. 13; 229 F.3d at 973. Thus, there were endless and, arguably "longer-standing," means of achieving the claimed educational benefits without eliminating the practice. "There necessarily exist further alternatives to the practice of having students correct other students' papers without parental consent or anonymity." *Id.*

Indeed, the Oklahoma Education Association president, Carolyn Crowder, explained that this ruling would not "really change the way teachers teach." And, the teachers will "continue to use good sense in protecting students'

noncompliance." 5 U.S.C. § 552a(e)(9). The Internal Revenue Code provides that tax returns are confidential, and may not be disclosed by any "officer or employee" (or former officer or employee). 26 U.S.C. § 6103 (2001). The Financial Right to Privacy Act, 12 U.S.C. § 3401 *et seq.* (2001), prohibits a government authority from having access to financial records. Government authority is defined as "any agency or department of the United States, or any officer, employee, or agent thereof." 12 U.S.C. § 3401.

privacy."[12] The teacher could grade her own papers. And, if she wished to return them to students with a minimum of work, she could have students hand out the graded papers in a sealed envelop or folded over to cover the grade, or could have students approach the teacher individually to receive their own papers. Artwork may still be displayed without a name or grade attached. Even the Petitioners' concede that with student identification or exam numbers, teachers could collect student papers, shuffle them, and hand them out for peer grading.

There simply exists no evidence, and the school district has failed to present any record evidence, that would demonstrate that the Owasso teachers were not able to meet their daily, semester or year-end curriculum objectives if they complied with the Tenth Circuit decision by either grading anonymously or providing parental consent. The Court of Appeals' decision, taken together with the undisputed evidence in the record, demonstrates that Owasso and its teachers could easily modify its grading practices with little or no burden to the school district, the teachers or the students. Since the record in this case establishes that other teachers and school districts are able to meet the same curriculum objectives without disclosing students' grades, Petitioners' fear that the decision will disrupt a significant educational practice is neither supported by the facts nor the law of this case.

Even District Judge Kern doubted whether "the grading method under review could not undergo modification while still properly educating students." Record in the Tenth

[12] Kurt, *Grading Lawsuit Ruling Expected to Bring Warning for Teachers,* Shawnee-News-Star Online, Tuesday, August 1, 2000.

Circuit, Appellant's App., p. 15. The district court stated that it would be hard-pressed to find that this grading practice is supported by any compelling school district interest. *Id.* Judge Kern explained that "the record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method." *Id.*

Moreover, the testimony of the teachers that they were willing to allow students to grade their own papers and then bring their own papers up to the front of the class is compelling. Record in the Tenth Circuit, Appellee's App., p. 127. Logically all students could be given and exercise this option. Thus, the fact that all students could grade their own papers and come forward with their own grade, belies the school district's protestations that teachers cannot possibly meet their curriculum objectives.

Petitioners' concern of not being able to disclose honors and awards is resolved by the statutory grant of authority to release such student awards as provided in the "directory information." Section 1232g(a)(5)(A) specifically allows the release of student award information.

With regard to the "immediate feedback" the Court held that this could be accomplished if the students were allowed to grade their own papers and tests. Indeed, such exercise is more "immediate" than having a peer grade one's work. In fact, scoring someone else's paper delays feedback and focuses attention on someone else's understanding, not on one's own. Thus, if the purpose is to provide immediate feedback, certainly the best way is to provide it directly to the test taker.

Accordingly, the Petitioners' protestations that the Tenth Circuit opinion "somehow marks the end of the world for

teachers" are far exaggerated. Pet. App. A-29, n. 13; 229 F.3d at 973.

CONCLUSION

Congress has spoken with clarity to the precise question raised by this case. The practice of exchanging papers and then calling out the grades unlawfully circumvents the purpose of safeguarding the students' personal grade information. The Tenth Circuit and the District Court correctly found that there exist reasonable alternatives that would pose no onerous burden on the school district or the teachers. While it was not necessary to look beyond the plain meaning of the statutory language in determining what constitutes "education records," the foregoing analysis coupled with the Court of Appeals' decision supports the conclusion that Congress intended to fashion a broad definition of "education records" to include student grades being recorded and maintained in the teacher's grade book. This Court should affirm the Court of Appeals' decision, because it clearly and unequivocally comports with the purposes and structure Congress intended to achieve.

Respectfully submitted,

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